Supreme Court, U.S.
FILED
AUG 4 1994
OFFICE OF THE CLERK

No. 94-39

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

HENRY D. SEDGWICK STERN and WALTER B. SLOCOMBE,
Personal Representatives of the Estate of Philip M. Stern,

Petitioners,

vs.

GENERAL ELECTRIC COMPANY, JOHN F. WELCH, JR., LAWRENCE A. BOSSIDY, EDWARD E. HOOD, JR., RICHARD T. BAKER, JAMES G. BOSWELL II, SILAS C. CATHCART, CHARLES D. DICKEY, JR., LAWRENCE E. FOURAKER, HENRY H. HENLEY, HENRY L. HILLMAN, ROBERT E. MERCER, GERTRUDE G. MICHELSON, BARBARA SCOTT PREISKEL, LEWIS T. PRESTON, FRANK H.T. RHODES, ANDREW C. SIEGLER and WALTER B. WRISTON,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION RESTATED

Should this Court review a District Court's discretionary decision denying a motion to further amend an amended complaint to add a state law claim for corporate waste arising out of an alleged violation of the Federal Regulation of Lobbying Act?

STATEMENT REQUIRED BY RULE 29.1

Respondent General Electric Company does not have a parent company. In addition to its wholly-owned subsidiaries, General Electric has ownership interests in the following companies which have publicly-held debt or equity securities:

GECC Financial Corporation (Hawaii)

General Electric Capital Corporation
(formerly General Electric Credit Corporation)

General Electric Capital Canada, Inc.

General Electric Capital Services, Inc.
(formerly General Electric Financial
Services, Inc.)

General Electric Credit International, N.V.

Montgomery Ward & Co., Incorporated (50% GE owned)

CAMCO, Inc. (Canada) (51% GE owned)

General Electric Capital Preferred Asset
Corporation

GNA Corporation

Mercur Bank (Austria)

Imaging Financial Services, Inc.
(formerly Eastman Kodak Credit Corp.)

Dart & Kraft Leasing Corporation

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondents General Electric Company (''GE'') and the present and former GE directors named as defendants in petitioner's amended complaint request that this Court deny the petition for writ of certiorari to the Court of Appeals for the Second Circuit.

Petitioner would have this Court review a discretionary decision by a District Court denying a motion to further

amend an amended complaint. The motion sought to add a claim for corporate waste arising out of an alleged violation of the Federal Regulation of Lobbying Act (''FRLA'') (App. B-1-B-6).[1] Contrary to the petition, this case does not present a question of federal law. Instead, the case involves a question of state law — whether the individual defendants engaged in corporate waste in connection with GE's political action committee — that turns in part on an interpretation of the FRLA. Even if petitioner's FRLA allegations were not entirely derived from state law claims, the FRLA questions he raises present no conflict among the Circuits, and the decisions below are fully consistent with Supreme Court precedent. Accordingly, this case is plainly inappropriate for consideration by this Court.

STATEMENT OF THE CASE

This petition represents the culmination of an eight-year-old shareholder derivative action claiming that GE's support of a political action committee (''GE/PAC'') constitutes a waste of corporate assets under the law of New York, the state of GE's incorporation.[2] During the long history of this litigation, the Court of Appeals for the Second Circuit, the District Court for the Southern District of New York, the Court of Appeals for the District of Columbia Circuit, the District of Columbia District Court and the Federal Election Commission have repeatedly held that GE and GE/PAC have fully complied with the federal election laws that authorize corporations, unions and other groups to sponsor PACs. Contrary to petitioner's belief, a shareholder derivative action is

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1 Citations to ''App.'' are to the Appendix accompanying the petition.

2 The original shareholder plaintiff Philip M. Stern died on June 1, 1992. The personal representatives of his estate were substituted as plaintiffs by order of the District Court entered September 4, 1992. For simplicity, the various plaintiffs will be referred to herein as petitioner.

not an appropriate forum for debating whether these federal laws are sound public policy.[3]

Petitioner's original shareholder derivative complaint was filed in May 1986. It included allegations of corporate waste arising out of alleged violations of the Federal Regulation of Lobbying Act, 2 U.S.C. §§ 261-270 (''FRLA'' or the ''Act''), and the federal anti-bribery statute, 18 U.S.C. § 203, as well as the alleged lack of benefit to GE from its financial support of GE/PAC. The FRLA allegations asserted that the individual defendants had exposed GE to prosecution under the Act for not reporting the administrative expenses of GE/PAC as ''lobbying'' expenses. The linchpin of petitioner's argument was his allegation that GE/PAC contributions were used by GE management to ''lobby'' Congress, as that term is used under the FRLA.

Petitioner's original complaint, including the FRLA allegations, was dismissed by the District Court in May 1987.[4] On appeal, the Court of Appeals for the Second Circuit affirmed, but granted petitioner leave to replead his allegations of corporate waste arising out of GE/PAC's alleged lack

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3. Petitioner Philip Stern was an activist who used his considerable wealth to promote a variety of social and political causes. He wrote an anti-PAC study, *The Best Congress Money Can Buy* (1988), as well as a sequel, *Still the Best Congress Money Can Buy* (1992). He also appeared as an anti-PAC spokesman on radio and television programs. Petitioner and petitioner's counsel founded Citizens Against PACs, a political advocacy group.

4. Petitioner also filed an administrative complaint with the Federal Election Commission (''FEC''), alleging that GE and GE/PAC had violated the Federal Election Campaign Act (''FECA''), 2 U.S.C. §§ 431-55. The FEC dismissed these charges in a decision subsequently affirmed by the District of Columbia District Court and the Court of Appeals for the District of Columbia Circuit. *See Stern* v. *FEC*, 921 F.2d 296, 298-99 (D.C. Cir. 1990).

of benefit to GE. *Stern* v. *General Electric Co.*, 924 F.2d 472 (2d Cir. 1991). In April 1991, petitioner filed an amended complaint. On December 31, 1991, the District Court denied respondents' motion to dismiss the amended allegations of corporate waste and ordered expedited discovery.

Discovery established that GE/PAC operates under the supervision of a committee of 25 to 30 GE managers and professionals from the various GE business units. A GE/PAC chairman, vice chairman and other officers are elected from among the committee members. The annual GE/PAC solicitations are organized around committee members who serve as "Zone Captains," distribute written materials on GE/PAC and contact eligible employees within their business units.

The GE/PAC committee holds annual meetings at which an estimated contribution budget for the following year is approved. Before 1991, a PAC subcommittee would meet prior to the annual meeting with the GE government relations staff and determine a two-year line-by-line budget identifying contributions to particular candidates. In 1991, the process was simplified as part of a corporate-wide effort at reducing paperwork and bureaucracy. Under the current system, the GE/PAC committee approves an annual budget allocating estimated contributions among House and Senate campaigns and the two major parties. While retaining ultimate authority over all contribution decisions, the committee then delegates candidate-by-candidate determinations to GE government relations experts. Individual participants have the option to designate the party or candidate of their choice. All GE/PAC campaign contributions are reported to the committee on a monthly basis and in annual reports distributed to all GE/PAC contributors.

On March 12, 1992, near the end of discovery, petitioner moved to further amend his complaint to add a cause of action identical in substance to the FRLA allegations set forth in his original complaint that had previously been dismissed.

In an attempt at avoiding the prior dispositive holdings of the District Court and the Court of Appeals, petitioner asserted that "new" facts had been discovered. The District Court rejected this claim and denied petitioner's motion to amend on June 2, 1992 concluding, in the exercise of its discretion, that "nothing in petitioner's current argument . . . would lead us to reinstate allegations of FRLA violations that have been found inadequate as a matter of law by both this Court and the Second Circuit." (App. B-5).

On May 16, 1994, the Court of Appeals for the Second Circuit summarily affirmed the District Court's decision denying petitioner's motion to amend the amended complaint (App. A-1). This petition for a writ of certiorari to the Court of Appeals for the Second Circuit was filed with the Court and received by respondents on July 5, 1994.

REASONS WHY THE PETITION SHOULD BE DENIED

I. There Is No Federal Question Justifying Supreme Court Review.

Petitioner suggests that he possesses a claim under the FRLA (*see* Pet. at 2-3). In fact, the FRLA is a criminal statute enforceable only by prosecution, with no express or implied private right of action. Petitioner's FRLA "claim" arises only in the context of a shareholder derivative claim in which petitioner maintains that the GE directors named as defendants engaged in corporate waste by exposing GE to prosecution for violation of the FRLA. This corporate waste claim arises solely under state law and does *not* directly raise a federal question.[5]

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5. The original and amended complaints did not allege federal question jurisdiction, but relied solely on diversity of citizenship.

Where, as here, the sole issue before this Court is one involving state law, a grant of certiorari is inappropriate. *See, e.g., Haring* v. *Prosise*, 462 U.S. 306, 314 n.8 (1983) (''standing alone, a challenge to state-law determinations by the court of appeals will rarely constitute an appropriate subject of this Court's review''); *see also Propper* v. *Clark*, 337 U.S. 472, 486-89 (1949) (''In dealing with issues of state law that enter into judgments of federal courts, we are hesitant to overrule decisions by federal courts skilled in the law of particular states unless their conclusions are shown to be unreasonable''). This is particularly the case where, as here, the state law issue was determined below in the context of a discretionary ruling on a motion to amend under Federal Rule of Civil Procedure 15(a). *See Foman* v. *Davis*, 371 U.S. 178, 182 (1962).

II. There Is No Other Basis For Supreme Court Review

The only basis petitioner asserts for a grant of certiorari is that the case raises an important federal question under Supreme Court Rule 10.1(c). As demonstrated above, there is no federal question in this case, much less an important one. Moreover, even if petitioner's FRLA allegations were not part and parcel of a state law corporate waste claim, they would still not present any federal question of importance.

First, there is no conflict among the Circuits creating uncertainty about application of the FRLA to political action committees. As a result, there is no need for this Court to review the issues raised by petitioner's FRLA allegations. *See* Sup. Ct. Rule 10.1(a); *see also Taylor* v. *United States*, 493 U.S. 906, 907 (1989) (Stevens, J., concurring) (given lack of inter-circuit conflict, ''the Court's denial of certiorari . . . is entirely consistent with rules governing the management of our certiorari docket''). Indeed, other than in proceedings brought by petitioner, there has been only one published

ruling on the FRLA since the Court's decision in *United States* v. *Harriss*, 347 U.S. 612 (1954). *See Bradley* v. *Saxbe*, 388 F. Supp. 53 (D.D.C. 1974) (declaratory judgment that public officials are exempt from registration under FRLA).

Moreover, the District Court's discretionary decision not to permit petitioner's FRLA amendment to his amended complaint is fully consistent with this Court's interpretation of the FRLA in *Harriss*. *Harriss* involved a challenge to the FRLA as an unconstitutionally vague assault on First Amendment rights. In upholding the statute, this Court carefully narrowed its application, ruling that the FRLA only applied "to direct communication with members of Congress on pending or proposed federal legislation." 347 U.S. at 620.

As a result, neither GE/PAC nor GE's support of GE/PAC can possibly be considered "lobbying" activity under the FRLA. While the PAC seeks to improve GE's ability to compete with scores of other organizations and interest groups in communicating its positions to Congressional committees and staff as well as Members of Congress, the PAC's solicitation and campaign contribution activities are not themselves "direct communication with members of Congress." *See Stern* v. *General Electric Co.*, 924 F.2d at 478 ("Because these expenditures do not constitute 'direct communication' with government officials, they need not be reported under the FRLA." (quoting *United States* v. *Harriss*, 347 U.S. at 620)); *Federal Lobbying* 4 (J. Jacobs ed. 1989).

Petitioner repeatedly misinterprets the *Harriss* three-part test for "lobbying activities," arguing that the solicitation of contributions element of the test refers to solicitation of *campaign* contributions such as those made by GE/PAC (Pet. at 16). In fact, this element of the *Harriss* test refers only to solicitation of funds contributed to a "lobbyist" to pay the expenses of his or her "direct communication with members of Congress." *See Harriss*, 347 U.S. at 620-21. It does *not* refer to contributions to a Congressional election campaign, even if such contributions are made through persons

otherwise engaged in FRLA "lobbying" activity. *Cf. Stern* v. *FEC*, No. 89-0089, slip op. at 7-9 (D.D.C. Aug. 31, 1989), *aff'd*, 921 F.2d 296, 298 (D.C. Cir. 1990) (campaign contributions are "political" not "legislative" activities, whether or not motivated by legislative concerns).

The employee-donated funds that are contributed to election campaigns by GE/PAC are not "contributions" under the FRLA, since they are not used to fund the salaries or expenses of anyone engaged in direct communication with any member of Congress on legislative issues. Similarly, neither GE nor its government relations personnel are required to report as "lobbying" any activities in connection with the solicitation or distribution of such funds, since those activities do not entail direct communication with members on legislative issues.[6]

Petitioner invites the Court to "restore vigor" to the FRLA by, in effect, overruling *Harriss* (*see* Pet. at 13). But there is no reason for this Court to revisit its longstanding, restrictive interpretation of the FRLA. This Court has repeatedly recognized that "the doctrine of stare decisis is of fundamental importance to the rule of law." *Hilton* v. *South Carolina Pub. Rys. Comm'n*, 502 U.S. 197, ___, 112 S. Ct. 560, 563 (1991) (quoting *Welch* v. *Texas Dep't of Highways & Pub. Transp.*, 483 U.S. 468, 494 (1987)). This policy is particularly applicable where, as here, the decision which the Court is invited to revisit involved the interpretation of a federal statute. "'Considerations of stare decisis have special force in

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6. Petitioner asserted for the first time on appeal and again asserts before this Court that direct communication on legislative issues does occur when GE government representatives attend fundraising events for which GE/PAC has purchased tickets (Pet. at 17). Petitioner cites no evidence for this claim, and the deposition testimony of GE's Executive Vice President in charge of government relations is to the contrary.

the area of statutory interpretation, for here, unlike in the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what we have done.''' *Id.* at 564 (quoting *Patterson* v. *McLean Credit Union*, 491 U.S. 164, 172-73 (1989)). Congress has had 40 years to address the effect of this Court's decision in *Harriss*, but it has not done so.[7]

Finally, respondents are unaware of any corporate sponsor of any PAC that reports its PAC support costs under the FRLA. Nor is such reporting even mentioned as a possibility in any case, commentary or other authority cited by petitioner or known to respondents' counsel. In fact, there is a long-standing consensus among government officials, commentators and practitioners that the FRLA as interpreted by the Court in *Harriss* is an extremely narrow statute.[8] Despite repeated calls for reform over the last 40 years, the Act has not been clarified or expanded by Congress. As the Senate Committee on Governmental Affairs stated in an April 1993 report on proposed lobbying legislation, ''the Lobbying

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7. Over 25 bills relating to Federal lobbying have been introduced in the current session of Congress. On May 6, 1993, the Senate passed S. 349, the Lobbying Disclosure Act, a bill that modifies lobbying regulations by, among other things, repealing the FRLA. On March 24, 1994, the House amended and passed S. 349, and the bill has moved to a House-Senate conference. Given that Congress is reevaluating the legislative scheme in this area, it would be particularly inappropriate for the Court to revisit its prior interpretation of the FRLA at this time.

8. *See, e.g.*, *Public Disclosure of Lobbying Act: Hearings on H.R. 15 Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary*, 94th Cong., 1st Sess. 665-702 (1975) (testimony and statements of Deputy Asst. Atty. Gen. Keeney and Deputy Comptroller Gen. Keller); Landau, *Public Disclosure of Lobbying*, 22 How. L.J. 27, 37-39 (1979); Comment, *First Amendment Constraints on Reform of the Federal Regulation of Lobbying Act*, 57 Tex. L. Rev. 1219, 1222-24 (1979).

Regulation Act has been a failure: it is unclear and confusing, unenforced, and it has failed to ensure the public disclosure of meaningful information about lobbying activities." *Lobbying Disclosure Act of 1993: Report of the Senate Comm. on Governmental Affairs to Accompany S. 349*, 103rd Cong., 1st Sess. 8 (1993).

* * *

Under Rule 10.1 of the Supreme Court Rules, "[a] review on writ of certiorari is not a matter of right, but of judicial discretion," and a petition "will be granted only when there are special and important reasons therefor." This case does not raise a federal question and is based on distorted and erroneous allegations that arise out of petitioner's personal convictions regarding the nation's campaign financing system. The FRLA issues raised by the petition are entirely inappropriate for review by this Court.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be denied.

New York, New York
August 4, 1994

Respectfully submitted,

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